STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

S. L. DOUGLASS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	NO. 75-CE-116-F 3 ALRB No. 59

On February 10, 1977, Administrative Law Officer David C. Nevins issued his decision dismissing the complaint in this case and denying respondent's request for remedies in its favor. Timely exceptions were filed by respondent. The general counsel's answer to respondent's brief in support of exceptions was not timely filed and, pursuant to respondent's motion, we decline to consider it as part of the record in this case. A timely answer was, however, filed by the charging party.

Having reviewed the record, we unanimously adopt the administrative law officer's recommendation with regard to dismissal of the complaint. The complaint in this case was properly dismissed in accordance with the Board's lunch-time access rulings in K. K. Ito Farms, 2 ALRB No. 51 (1976), Tomooka Brothers , 2 ALRB No. 52 (1976) , and Dessert Seed Company, Inc., 2 ALRB No. 53 (1976). After granting respondent's motion to dismiss the complaint, the administrative law officer indicated he would accept post-hearing memoranda concerning the respondent's request for litigation costs and emotional distress damages.

Much of respondent's argument in support of its request is based on evidence which was submitted for the first time as part of respondent's post-hearing memoranda. We do not consider such evidence to be a part of the record in this case.

A majority, Member Hutchinson dissenting, denies the respondent's request for remedies.[1/] Separate opinions follow.

Accordingly, pursuant to Labor Code Section 1160.3, the complaint herein is hereby dismissed in its entirety and the respondent's request for remedies is denied.

Dated: July 26, 1977

GERALD A. BROWN, Chairman

RICHARD JOHNSEN, JR., Member

RONALD L. RUIZ, Member

[1/]Respondent requests that this Board take oral argument as to the remedial aspect of the case. The administrative law officer has given adequate treatment to the issues raised by respondent's request for remedies in its favor. We deem further argument to be unnecessary.

CHAIRMAN GERALD A. BROWN, Concurring:

I note that the administrative law officer assumed, without deciding, that this Board has implied power to award litigation costs and emotional distress damages to a respondent which has been exonerated of unfair labor practice charges. As regards the litigation costs issue, my dissenting colleague has adopted this implied authority concept. In my view this approach is unsound. The broad remedial power which this agency possesses derives from Section 1160.3 of the Act. That section clearly indicates that it applies where respondents have been found to have engaged in conduct violative of the Act. With that fact established the Board is empowered to devise remedies which are directed to the unlawful conduct and its effects. Unlike my colleague, I nowhere find in this statutory scheme a general charter empowering this Board to remedy all of the evils disclosed in a given case by the imposition of sanctions upon parties whether or not they have violated the Act.

In addition, such a claim of inherent authority is imprudent in view of the present state of California law. The claim arrogates to this agency a power not yet determined to reside even in the superior courts. It is evident that the California Supreme Court did not decide this issue in D'Amico v. Board of Medical Examiners, 11 C. 3d 1, 27 (1974). And, while in Santandrea v. Siltec Corp., 56 Cal. App. 3rd 525 (1976), an appellate court expressly upheld such an exercise of power by

the trial court, in Young v. Redman, 55 Cal. App. 3rd 834 (1976), after a careful review of California law another appellate court expressly rejected similar trial court action. Wisdom dictates restraint in the face of such ambiguous authority.

Dated: July 26, 1977

GERALD A. BROWN, Chairman

MEMBER RUIZ, Concurring:

Since the majority has concluded that the record in this case does not support the award sought by the respondent, I find it unnecessary to reach the issue of whether the implied power attributed to this Board by the ALO exists.

Dated: July 26, 1977

RONALD L. RUIZ, Member

MEMBER JOHNSEN, Concurring:

I agree with the administrative law officer that in light of Labor Code Section 1160.3 some implied authority would have to exist in order for this Board to make an award of attorney's fees or emotional distress damages to a respondent. The administrative law officer concludes that even if such authority does exist, attorney's fees and emotional distress damages are not warranted in this case. In arriving at that conclusion, the administrative law officer does not rely on any precedent under the NLRA.

With respect to attorney's fees, there is NLRB precedent setting forth criteria for an award to charging parties and the general counsel.[1/] We should not overlook the possibility of the same reasoning being applied to respondents who defeat unfair labor practice charges.

Unlike the situation with respect to attorney's fees, no NLRB precedent exists for the awarding of emotional distress damages. The lack of such precedent is, in my opinion, an important consideration in not making awards of emotional distress damages under our Act.

Dated: July 26, 1977

RICHARD JOHNSEN, JR., Member

[1/] Tiidee Products, Inc. and I.U.E., 194 NLRB 1234, 79 LRRM 1175 (1972); Tiidee Products, Inc., and I.U.E., 196 NLRB 158, 79 LRRM 1692 (1972); and I.U.E. v. NLRB (Tiidee Products, Inc.), 502 F. 2d 349, 86 LRRM 2093 (C.A.D.C. 1974). See WESTERN CONFERENCE OF TEAMSTERS (V. B. Zaninovich & Sons, Inc.), 3 ALRB No. 57 (1977).

MEMBER HUTCHINSON, Dissenting:

I respectfully dissent from the majority's conclusion that this record does not support an award of attorney's fees and litigation costs to the respondent.

I agree that we cannot consider evidence submitted by the respondent after the close of the hearing. However, the record discloses sufficient reasons for awarding fees and costs without considering this material.

It is obvious from the pleadings and the transcript of the hearing that neither the charging party nor the general counsel knew of any evidence that organizers were ever denied access other than at times outside the protection of our access regulation as interpreted in K. K. Ito Farms, 2 ALRB No. 51 (1976). Our decision in that case was issued in October of 1976. The hearing in the present case did not commence until January 24, 1977. It should have been immediately recognized

that the K. K. Ito Farms decision clearly disposed of the charge in the present case.

The ALO observed, "this case never should have come to trial." However, he concludes somewhat charitably, the failure to dismiss the charge and complaint was due to an "innocent mistake."

Had there been any testimony available to indicate some doubt as to the applicability of K. K. Ito Farms, supra, whether or not ultimately proved, the conduct of the general counsel and the charging party might be so excused. Since there was not, the inescapable conclusion is that the matter was pressed to hearing either to achieve some other purpose or out of a reckless disregard of the rights of the respondent to be free from the expense of defending against utterly nonmeritorious claims.

I am well aware of the fact that neither the general counsel nor the charging party have committed an unfair labor practice. Thus, any power we derive from Labor Code § 1160.3 is inapplicable here. However, for the reasons expressed in my concurring opinions in Robert S. Andrews, et al., 3 ALRB No. 45 (1977), and Western Tomato Growers & Shippers, Inc., et al., 3 ALRB No. 51 (1977), I would use this Board's inherent regulatory authority to impose sanctions on conduct abusive of the agency's processes in the form of an assessment of litigation costs and attorney's fees to the aggrieved party.

The, majority concludes that a split of authority, see, e.g., Santandrea v. Siltec Corp., 56 Cal. App. 3rd 525 (1976), and Young v. Redman, 55 Cal. App. 3rd 827 (1976),

requires inaction by this Board in the face of what all agree is a serious concern.[1/] Assuming, arguendo, that Code of Civil Procedure § 1021[2/] prohibits California's trial courts from awarding litigation costs in the absence of statutory authority it does not follow that this Board is similarly prohibited. Unlike the state trial courts this agency has the affirmative obligation to effectuate the purposes and policies of a specific enactment. Labor Code § 1142(b). To fulfill that obligation the Board possesses legislative, administrative, investigatory, and judicial powers. See, e.g., Labor Code §§1142(b), 1144, and 1151. If our power can be used to adopt regulations that effect the substantive rights of the parties, see, e.g., Cal. Admin. Code § 20900, then, in my view, it is not an arrogation of power to adopt, by case decision, reasonable measures for

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[1/]The court in Young v. Redman, 55 Cal. App. 3rd 827, 838, (1976), expressed its frustration as follows:

> It may well be advisable in light of the ... ever increasing cascade of civil litigation that the power to impose such sanctions in California's trial courts should exist, thus adding a much needed element of discipline on the trial court level toward a reduction in the burning up of valuable court time handling frivolous, 'bad faith' matters devoid of merit and make whole litigants who were forced to expend money on legal fees to meet such unfounded positions.

[2/]That section provides, in pertinent part:

> [e]xcept as attorneys' fees are specifically provided for by the statute, the measure and mode of compensation . . . is left to the agreement, expressed or implied, of the parties „. . .

As is clear from the language of § 1021 its primary thrust is to exclude attorney's fees as items of compensable damage in civil actions. I think a valid distinction exists where the award is imposed as a sanction by a court charged with the responsibility of administering the judicial machinery.

the purpose of deterring misuse of our adjudicatory processes. The source of the power is the same in either case.

I see no reason to withhold the use of our authority simply because we would be dispensing this agency's funds by levying an assessment against the general counsel. Such a result did not deter the trial court, nor offend the appellate court in D'Amico v. Board of Medical Examiners, 11 Cal. 3rd 1 (1974). There the Attorney General of the State of California was ordered to pay $750 in attorney's fees for engaging in frivolous litigation. This Board's power to protect its processes from abuse and insure against unnecessary costs to the parties flows down a two-way street.

The opportunity to deter future misconduct is here and now. The responsibility to provide such deterrence is the Board's; the choice to avoid the undesirable consequences of the sanctions is the litigants'.

Dated: July 26, 1977

ROBERT B. HUTCHINSON, Member

STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

S. L. DOUGLASS,
Respondent

and

UNITED FARM WORKERS, AFL-CIO,
Charging Party

Case No. 75-CE-116-F

Alberto Y. Balingit, for the General Counsel;
John T. Hayden and Thomas Campagne, of Littler, Mendelson, Fastiff and Tichy, San Francisco, California, for the Respondent;

Sister Jean Eilers, of Delano, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID C. NEVINS, Administrative Law Officer: This case was heard by me on January 24 and 25, 1977, in Exeter, California. The original complaint in this matter was issued on November 18, 1975, and was formally amended on January 19, 1977, five days before the hearing. Other amendments to the complaint were made at the outset of the hearing. The complaint was based on a charge filed by the United Farm Workers, AFL-CIO (hereafter the "UFW"), and duly servied on the Respondent, S. L. Douglass, on October 17, 1975.

All parties were represented at the hearing and given a full opportunity to participate in the proceeding. Shiftily after the close of the General Counsel's case-in-chief, and after a brief witness was preferred by the Respondent, the Respondent moved to dismiss the complaint. As noted below, I granted the Respondent's motion. Following my dismissal of the complaint, the parties submitted written memoranda in respect to certain remedies requested by Respondent against the UFW and the

General Counsel.

Based upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments and memoranda submitted by all three parties, I make the following findings of fact and conclusions:

FINDINGS OF FACT

I. Jurisdiction.

The Respondent was alleged and admitted to be an agricultural employer within the meaning of Section 1140.4(c) of the Agricultural Labor Relations Act (hereafter referred to as the "Act"). The Respondent is admittedly engaged in the growing, packing, and shipping of grapes, in Tulare County. The UFW was alleged and admitted to be a labor organization within the meaning of Section 1140.4(f) of the Act, and I so find.

II. The Alleged Unfair Labor Practices.

The General Counsel's amended complaint charged the Respondent with a single violation of the Act. The complaint alleged that on October 16, 1975, the Respondent, through its supervisors, "denied to representatives of the UFW access to its premises for purposes of engaging in organizational activity will respect to its employees in accordance with Section 20900 of the 1975 Board Regulations." The General Counsel asserted that the denial of access violated Section 1153 (a) of the Act.

The Respondent denied it violated the Act.

III. The Facts.

A. The Evidence And Respondent's Motion To Dismiss The Complaint:

The undisputed testimony put forth by witnesses for the General Counsel indicated that on October 16, 1975, three UFW organizers visited the Respondent's property for purposes of organizing the Respondent's employees. The three organizers began their employee solicitations at about 10 o'clock in the morning. It was undisputed according to those organizers that they made their solicitations while the employees were working, picking and packing grapes.[1/]

1/ The Respondent's employees work on a "piece-rate" basis, and it was stipulated that they have no designated lunch hour. On the day in question, the employees apparently began--(continued)

When the organizers first began their employee solicitations, they were asked to leave the property by someone (unidentified) who they assumed was a supervisor for the Respondent. The organizers refused to leave, believing they had the right to organize workers on an employer's property for one hour during any time of the day so long as the employer had no designated lunch hour for its employees. The UFW's organizing activity continued, but about ten minutes later at least two of them were again asked to leave the premises, this time by Ms. Hammons, an admitted supervisor under the Act. Again they refused, continuing their employee solicitations while slowly returning to their vehicle. Eventually, a pickup truck carrying Armen Shuklian, an admitted supervisor, and Candido Similla, whose supervisory status is in doubt, arrived on the scene. Shuklian placed the three organizers under a citizen's arrest; deputy sheriffs then arrived and took the organizers to jail.2/

No dispute existed among the two organizers who testified that the foregoing activity all took place sometime between 10 a.m. and 11 a.m., on October 16, 1975. Nor did they dispute that their organizing activity took place while the employees were physically working, the organizers talking to the workers and asking them to sign UFW authorization cards while work was in progress. The organizers admittedly made no effort to learn when the employees would take their lunch break that day.

Based on the above-described testimony, the Respondent moved to dismiss the complaint in its entirety, or, in the alternative, for summary judgment in its favor, citing K. K. Ito Farms, 2 ALRB No. 51 (1976), Tomooka Brothers. 2 ALRB No. 52 (1976), and Dessert Seed Company, Inc., 2 ALRB No. 53 (1976). Those three cases all dealt, at least in part, with that portion of the Board's "Access Regulation"" in issue in this proceeding.

1/ (continued)--work at 9:00 a.m., having waited an hour before working because of the dampness, and then ate their lunch after 1:00 p.m. According to Juanita Hammons, the Respondent's quality control supervisor at the time, employees normally ate their lunch after 12:30 or 1:00 p.m. on those days when they began work as late as 9 o'clock.

2/ Of course, what passed between the organizers and Shuklian had a little-more color than described above, but the detention and eventual arrest of the organizers were the key elements established in the General Counsel's presentation.

In K. K. Ito Farms, the Board stated, "we interpret Subsection 5(b) to grant access during a one-hour period which encompasses the established lunch time, or if there is none, the time when employees are actually taking their lunch break, whenever that occurs during the day." The Board expressly found erroneous the UFW's interpretation of the Access Regulation which would entitle organizers to come onto an employer's property to organize employees for one hour at any time of the day, regardless of whether the employees were eating lunch, so long as that employer had no designated lunch hour. Tomooka and Dessert Seed reconfirmed the foregoing application of the Access Regulation to mid-day organizing visits, the latter of those two cases reiterating the Board's "strong" condemnation of "the failure of the union to abide by the access regulation in good faith." Those three cases make clear that organizing visits neither before nor after work must be confined to the time when employees are on their established lunch break or are actually eating lunch.

After the Respondent's motion and after an overnight recess, the General Counsel announced that the UFW had withdrawn the unfair labor practice charge in this case with the Regional Director's approval. The General Counsel moved that the instant complaint be dismissed as moot. The General Counsel's request to dismiss the complaint as moot was denied, and instead I granted the Respondent's motion to dismiss the complaint, relying on the authority and interpretations expressed in K. K. Ito Farms, Tomooka Brothers, and Dessert Seed. The General Counsel did not oppose the Respondent's motion to dismiss the complaint based on the merits of the case.

B. The Respondent's Requested Remedies;

Following dismissal of the complaint, the Respondent moved that certain remedies be imposed against the General Counsel and the UFW. Those remedies are as follow:

1. The issuance of a formal statement written and signed by an officer of the ALRB or the General Counsel's office that the facts forming the basis of the instant case did not constitute a violation of the ALRA.

2. That the above-mentioned formal statement be read by an officer of the ALRB or the General Counsel's office to the Employer's employees during the next seasonal peak.

3. The 'issuance of an order requiring the

General Counsel and the UFW, jointly and severally, to compensate the Employer, its supervisors, agents, and employees, for all emotional distress suffered by them as a result of this proceeding.

4. The issuance of an order requiring the General Counsel and the UFW, jointly and severally, to reimburse the Employer, its supervisors, agents and employees, for all expenses incurred in the investigation, preparation, presentation and conduct of the case, including but not limited to reasonable counsel fees, salaries, witness fees, transcript and records costs, travel expenses and per diem, and any other reasonable costs and expenses.

5. For such other and further relief as might effectuate the policies of the Agricultural Labor Relations Act.

As earlier noted, each of the parties submitted a post-hearing memorandum concerning the Respondent's requested remedies.

ANALYSIS AND CONCLUSIONS

I. Introduction.

The Respondent seeks remedies against the UFW, the Board, and the General Counsel, complaining bitterly that the Respondent has been the victem of frivolous litigation, has had to incur substantial legal costs to defend itself, and has been prevented from reaching a just and fair settlement of this case through the actions of the UFW and the-General Counsel's office.3/

3/ Many facts alluded to by Respondent in its Memorandum are facts not found in the existing record, although Respondent offers to provide evidence of those facts through affidavits or a further hearing. I do know, however, that during a settlement conference conducted in my presence on the first day of the hearing, the Respondent indicated its willingness to settle this case by posting appropriate notices, mailing such notices to employees, assuring employees that no breach of the Board's Access Regulation would occur in the future, and indicated the possibility of allowing a representative of the Regional Director--(continued)

The Respondent argues that the Board possesses inherent or implied power to protect the integrity of the Act's processes and to police its constituent bodies such as the Genera Counsel. Although the Respondent claims no right to its requester remedies under Section 1160.3 of the Act, that provision pertaining to the remedy of unfair labor practices, the Respondent does claim that the Act generally, as well as accepted notions within California as to an administrative agency's authority, together establish the power for the Board to carry out the Act's purposes, achieve the ends sought by out legislation, and the right to thus deter the General Counsel and a charging party from engaging in frivolous and improper litigation that frustrates the Act.

The General Counsel opposes the Respondent's requested remedies for several reasons. The General Counsel argues that his office has not engaged in malicious prosecution of the Respondent but in a good faith--albeit mistaken--attempt to carry out its statutory obligations, that no precedent exists to support the Respondent's remedial requests, and that the Act does not allow for remedies other than those associated with unfair labor practices. The UFW opposes the requested remedies, claiming that this case fails to present facts warranting the imposition of remedies against either it or the General Counsel. The UFW claims that, at worst, this case only demonstrates that it and the General Counsel proceeded against the Respondent in a mistaken view that Respondent violated the Act.

II. Conclusions.

It seems readily apparent that the Act, and in particular Section 1160.3, does not expressly furnish a statutory basis for proceeding against or granting a remedy against a party who does not engage in an unfair labor practice. Indeed, not even the Respondent claims such an express statutory basis for its requested remedies. Clearly, the explicit

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3/ (continued)-- to address employees during the next peak season to advise them of their access rights to union organizers. This offer by the Respondent was refused by the General Counsel and strongly opposed by the UFW. As far as any other or past attempts made by the Respondent to settle this case are concerned and as far as any other facet concerning the past history of conflict between the UFW and Respondent over access to Respondent's property, as, described in Respondent's Memorandum, the present record is silent.

provisions of the Act are directed toward remedying and prohibiting unfair labor practices, and just as clearly no claim can herein be raised that either the UFW or the General Counsel committed an unfair labor practice against the Respondent.

It might be, however, as the Respondent argues, that some implicit power exists under the Act to grant a remedy in favor of a respondent where circumstances demand such a remedy. Although I cannot now conceive of what circumstances might warrant the necessity or appropriateness for such a remedy, it might be that some egregious conduct could occur on the part of the General Counsel's office or on the part of a charging party in an unfair labor practice proceeding which might warrant the Board to take action against one or both of those parties in order to preserve the integrity of the Act or to insure the efficacy of its provisions. At this juncture, however, and in the absence of any guiding precedent (either under our Act or the National Labor Relations Act), there is great difficulty in pinpointing what egregious degree of misconduct the General Counsel's representatives or a charging party's representatives would have to engage in to warrant the imposition of sanctions against such a party or bestow exceptional remedies in favor of a respondent._4/

Nonetheless, assuming without deciding that the Board has implied power to grant the kind of remedies requested by the Respondent herein; I do not find the circumstances appropriate for granting such remedies in this case. It is true, as claimed by the Respondent, that this case never should have come to trial. With but the most general knowledge or review of the Board's existing case authority, or with a basic understanding of the facts surrounding the charge in this case, the General Counsel's representatives should have known that no arguable merit attached to its unfair labor practice complaint. Indeed, even the UFW's original unfair labor practice charge in this case only claimed that the Respondent's denial of access to the UFW organizers occurred between 11:00 and 11:30 a.m., which should have been sufficient notice to the General Counsel's office

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4/ Of course, the Board's Regulations provide for the power to exclude from an unfair labor practice hearing persons engaging in disruptive conduct or for citing such persons with contempt, as well as providing for barring from practice before the Board those persons engaging in certain prohibited conduct or engaging in disruptive or abusive conduct. See, Sections 20270, 20760, 20820 of the Board's Regulations.

that some liklihood existed that the UFW organizers had no protected right under the Board's Access Regulation to be on the Respondent's property at the times in question.

The Act is new and practice under it has been brief. Mistakes are to be anticipated. In this case, regretfully, mistakes prevented both the Board and the General Counsel's office from husbanding their resources wisely and efficiently, as well as causing an unneeded burden on the Respondent

But, at most the record indicates to me that an honest mistake was made by the General Counsel's office, rather than the existence of any ill motive on its part. At worst, that office did not exercise sufficient independent discretion or use its resources wisely. Where, as here, the record does not demonstrate that conduct in bad faith was engaged in against a respondent, I believe an insufficient basis exists to warrant granting the type of relief that Respondent seeks.

The Respondent has been exonerated of the charge against it. It now has a declaration from the administrative law officer that it did not violate the Act on October 16, 1975, when it removed from its property the UFW organizers, who had no right in the first place being there under the Access Regulation. The Respondent is surely free to disseminate this conclusion in its favor to its employees or to the public, as it sees fit. But, in the absence of unusual circumstances, the Respondent's vindication here under the Act should serve it as its consolation, as it must serve other respondents found innocent after a full evidentiary trial.

ORDER

Having found that the Respondent engaged in no violation of the Act on October 16, 1975, the complaint herein is dismissed in its entirety. Respondent's request for remedies in its favor, however, is denied.

Agricultural Labor Relations Board,

By: David C. Nevins

David C. Nevins,
Administrative Law Officer

Dated: February 10, 1977